SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968.

Docket No. **957**

LAWRENCE BURNS,
Plaintiff-Appellee,

against

THE CUNARD STEAMSHIP COMPANY, LTD.,
Defendant-Appellant and Third-Party Plaintiff-Appellant,

against

JOHN T. CLARK & SON,
Third-Party Defendant-Appellee.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

THOMAS V. KINGHAM,
Attorney for the Cunard Steamship Company, Ltd., Defendant-Appellant and Third-Party Plaintiff-Appellant,
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New York, N. Y.

On Petition:
BERNARD MEYERSON.

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 RE 2-6978—1969

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, The Cunard Steamship Company, Ltd., prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, which affirmed a final judgment entered in the United States District Court for the Southern District of New York on March 29, 1968, by the Honorable H. R. Tyler, Jr., District Judge, which grants

plaintiff judgment in the sum of $105,000 for personal injuries and dismisses the third-party action against John T. Clark and Son, the employer of the plaintiff.

The opinion of the "Court of Appeals" is attached as part of the appendix to this petition, is not yet officially reported. The opinion of Trial Judge Harold R. Tyler, Jr., is set forth at pages 468 to 472a of the appendix for defendant-appellant in the Court below.

Jurisdiction.

The final decision of the Court of Appeals, Second Circuit, was entered on December 4, 1968.

The order denying rehearing was entered on December 23, 1968.

The jurisdiction of the Court is invoked under 28 U. S. Code 1254 (1).

Questions Presented.

Did *Erie v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, require the Court of Appeals, Second Circuit, to apply the rules of law defined by the New York State's highest tribunal, or was that Court free to apply federal interpretations of the New York law, as the opinion of said Court shows:

(a) That it disregarded and overruled the settled law of the State of New York that when the facts are undisputed they are to be considered as a question of law and not submitted to the jury, as there is no liability under New York State law when the alleged negligence required prophetic vision and could not be anticipated by the defendant.

(b) The opinion of the Court of Appeals, Second Circuit, undertakes to overrule 100 years of settled

New York State law, that the terms safe place to work does not make out a cause of action when the risks and dangers are obvious and the lower court case that is cited in the opinion as overruling the decisions of the New York Court of Appeals, instead supports them.

(c) The opinion of the Court of Appeals sets forth a startling precedent to the effect that when the City of New York undertook to give the Cunard Steamship Company a license to park cars and freight on the marginal street for a per item daily fee, the City thereby lost control of said street and said license transferred control and the duty to make repairs to Cunard and thus this license made the Street a part of Cunard's plant in spite of the settled New York law to the contrary.

(d) The settled law of New York State to the effect that the owner is not liable by reason of the use of defective equipment or appliance by the contractor has been overruled by the opinion of the Court of Appeals, Second Circuit, when it affirmed the dismissal of the third-party complaint although the plaintiff's own proof was to the effect that the hole was not dangerous until the third-party defendant supplied a defective pusher to which it negligently tied a rope around the weakly attached seat and the negligent conduct of its employee (plaintiff) in constantly applying more power caused the seat to fall off the pusher.

(e) The holding that Cunard could not recover on its third-party complaint overrules the settled law that when the liability of the defendant occupant is passive and the liability of the Stevedoring employer is the active cause of the injury the occupant may recover over on its third-party complaint.

Statement of Case.

The action is for negligence. The accident was sustained by a longshoreman on a New York City street adjacent to a pier rented by appellant Cunard Steamship Company. The longshoreman plaintiff was employed by the third-party defendant-appellee which in turn had contracted with the Cunard Steamship Company to remove cargo from its vessels. The plaintiff's job was to tow an automobile which had been unloaded from one of appellant's vessels. This automobile was to be towed across a marginal New York City street and left in an area of the street next to the bulkhead. Appellant had a license from the City of New York to use the street for this purpose and paid thirty cents a day to the City for each day a car remained on the street. It also paid a towage charge for heavy cargo left on the street. Plaintiff claimed there was a large hole in the street for two or more years. That he towed an automobile with one of his co-employees at the steering wheel. That he used a machine known as a pusher to do the towing. This machine belonged to his employer and was defective because it lacked a ring bolt to attach the tow rope. Therefore the tow rope was wound around the seat which was attached to the machine by only two hinges. Plaintiff saw the hole in the road and avoided same (however his co-employee failed to avoid the hole and its rear wheel got into same and stopped the pusher). Plaintiff then applied power to the pusher and the result was that he and the seat were ripped off the pusher. The accident caused plaintiff some injuries but the award of the jury was far out of proportion to the damages sustained.

The Testimony.

Lawrence Burns, the plaintiff, testified that he was 57 years old, had been a longshoreman for 20 years and

was employed by John T. Clark for 16 years. That he worked at Pier 92 since May 17, 1951 (23a). He was injured on September 17, 1961 (24a). On that date the vessel Media arrived at the pier at about 9 or 9:30 o'clock and they started to remove automobiles at about 2:00 p. m. That he was driving a tow wagon, better known as a pusher, to tow the cars. This pusher was about 4 feet high and 5 1/2 feet long. It had four wheels and was battery operated. That he had nothing to do with the operation of landing the automobile from the ship onto the stringpiece (26a). That he picked up the car inside the pier. The rope was attached to the tow wagon by the assistant superintendent (an employee of the third-party defendant [27a]). That there was a rope stretched out along the pillars of the overhead highway whenever Cunard had intentions of putting cars in the area. This occurred nearly every time a ship docked and the rope remained as long as the cars were there (29a, 30a). The checker in charge of these automobiles placed the rope (31a). The purpose of the rope was to keep out public traffic and preserve the area for the cargo cars (31a). From time to time he also saw heavy crates stored in that area. The heavy crates were unloaded by Merritt Chapman by its floating derrick (32a).

When plaintiff got to the entrance of the pier he had to make a right-hand turn. Before this particular time he had placed two or three cars in this area. One John Dempsey, a co-employee, was the steerer of the car that he was towing. The towed car had no power of its own (34a). His testimony continued:

> "A. Well, I drove about 75 foot, and I cleared this hole—
>
> "Q. Now, you say you cleared this hole. What are you talking about? A. The hole that the Jaguar got caught in.

"Q. Will you describe that hole as best you can, please? A. It was 2 1/2 to 3 foot wide and about 5 foot long, 5 or 6 inches deep.

"Q. How long had you observed that hole there? A. Oh, it had been there for a couple of years. It just kept getting bigger and bigger" (34a).

That he cleared the hole "maybe by a foot" but somehow or other the Jaguar ran into it. That when he was 10 or 12 feet past the hole, the right rear wheel of the Jaguar got stuck into same. He felt this because the pusher would not pull the weight (39a). The following question was then asked and answer given:

"Q. I see. Well, when you felt the tow wagon stop, what, if anything, did you do? A. I stopped and looked and I see that the wheel was caught in the hole so I jumped back on the seat and gave the tow wagon more gas" (40a).

However, it did not move and "the tow line that was tied around the seat of the tow wagon pulled the seat off the two wagon" (40a).

On cross examination plaintiff again stated that there was no ring bolt on the back of his machine and that was why they tied the rope around the seat. He admitted that the machine was owned by John T. Clark (52a). That the ring bolt was missing from this machine for about a year. This was qualified by the statement that his boss had so many tow wagons that he never got the same tow wagon twice so he did not know how long this particular tow wagon did not have the ring (53a). That when he made a right turn after leaving the pier he was on Twelfth Avenue. That some of the tow machines had a canopy over them but this one did not have a canopy (54a). He admitted that the line was tied by an assistant superintendent employed by John T. Clark. He did not know the horsepower of the pusher (57a). That he had proceeded some 75 feet towards 51st Street to

the right of the express highway until he came to this hole (58a). The distance between the bulkhead and the first pillar of the highway was about 15 or 20 feet (59a). That he first parked the cars along the bulkhead and the second line would then be in the roadway alongside of the first line and at that time only 2 or 3 were in line (61a). His testimony continued:

> "Q. So that as you came along you knew this hole was there, did you not? A. Yes.
> "Q. And you knew it had been there for a long period of time isn't that correct? A. Yes. I remember a couple of years it had been there only it kept getting bigger all the time.
> "Q. And you saw it? A. Yes" (61a, 62a).

That he cleared the hole by a foot or two but he did not call back to Mr. Dempsey to avoid it because "I had to watch on clearing the hole myself, sir" (62a). He had an area of 10 feet to his left to drive while clearing the hole (62a). That the last car had been parked some 30 to 40 feet in front of him. He did not get off the pusher after Dempsey's Jaguar's rear wheel got caught in the hole (63a). The following transpired:

> "Q. Well, as you stayed on, what did you do then? A. I gave it more gas. I figured maybe more gas would pull the car out of the hole, but the hole was too deep. The car still wouldn't come out.
> "Q. And then you gave it more gas, and that's when— A. It pulled the seat off" (63a).

Plaintiff then testified that his pusher could not have pushed the Jaguar out of the hole because it had no puller on it (63a). He admitted that J. T. Clark also owned hi-lo which could lift up heavy loads (64a). He admitted that he had no difficulty towing the two cars that he had previously put in place (67a). That they used to run up to the garage to see if they could get a pusher with a hook behind it. At times such a pusher

was not available so he had to take the one he used at the time of the accident (69a). He explained that "the farm" was a closed place that has a cyclone fence around it. That plaintiff's exhibits do not show the farm (76a). That the farm was located north of Pier 92 between 52nd and 53rd Streets (77a).

Officer Robert J. Crichton testified that on September 17, 1961, he was assigned to a radio with another officer. He received a radio call to go to Pier 92 and Twelfth Avenue at about 2:55 p. m. He arrived at same at about 2:59 p. m. He had no memory of the event and was forced to rely upon his memo book (78a). That he estimated that the hole in the street was 4 1/2 feet long, 2 1/2 feet wide and 5 inches deep (81a).

John Dempsey testified that he is a longshoreman and was employed by Cunard Steamship since 1951 (actually he was employed by the third-party defendant John T. Clark and Son) (87a). That his job on Pier 92 consisted of driving either a hi-lo or a crane and he finally admitted that he was on the payroll of John T. Clark (87a, 88a). He had nothing to do with the removal of the automobiles from the vessel onto the pier (89a). That these automobiles had no gasoline in them and their batteries were not connected so they had to be towed and all he would do is release the emergency brake and steer same. The cars in question were mostly Jaguars. Until about a year prior to the accident it was the custom to push the Jaguars but the procedure was stopped because the rears of the cars were being damaged (90a, 91a). That prior to the occurrence herein he had placed three or four automobiles on the marginal edge there south of Pier 92, one behind the other (91a). That the men on the dock tied the line to the car. That plaintiff towed the automobile he was in at a speed of 4 or 5 miles an hour. That he came directly out from the pier into the street. That they both turned right and as they got in line to

park the car both he and plaintiff bore left. He then had to bear right and when he did his rear right wheel went into the hole (92a). The following then transpired:

> "Q. Did you know that that hole was there? A. Yes, sir.
> "Q. How long had it been there, to your knowledge? A. Quite a number of years, sir.
> "Q. Was it always the same size or had it changed any? A. It had changed. It was not that big at first" (92a, 93a).

That after the right rear wheel went into the hole, his car stopped along with the pusher driven by Mr. Burns. Then plaintiff started to go again and his back seat came off the machine and he tumbled down while the Jaguar remained in the hole (93a).

On cross examination Mr. Dempsey again admitted that he knew of the existence of the hole prior to the occurrence of the accident (94a). His employer took a statement from him (Defendant's Exhibit C) where he had denied knowledge of the existence of the hole prior to the accident; however, he claimed that his statement was incorrect and he insisted that he did have prior knowledge of this hole (95a, 96a).

The witness also admitted that these pushers have places on their back for a ring bolt and that the tow line is attached to this ring bolt but this practice was not followed in the within case (96a). Instead the line was wound about the seat. That the seat was connected to the frame of the pusher by means of two hinges. This allowed the seat to be tilted when it was necessary to inspect the pusher's batteries which were located under the seat. That he was separated from plaintiff by some 8 or 10 feet and he was looking straight ahead (97a). The following then transpired:

> "Q. And as you were going along, did you see the hole? A. Yes, sir.

"Q. Did you turn to the left when you saw the hole? A. Yes, sir.

"Q. Pardon? A. Yes, sir.

"Q. Well, how far in front of you did you see the hole before you started to turn to your left? A. Further enough away that I could clear it" (97a).

The witness then stated that he thought he would have cleared it, but he did not. That when plaintiff veered to the left he also veered but he did not remember how far he had gone before something happened nor did he remember how far the hole was in front of him when he turned (98a).

Charles S. Dickson testified on the examination before trial that he was employed by the Cunard Steamship Company, Ltd., as assistant manager. That on September 17, 1961, he was the head accountant for the company with offices at 25 Broadway. That on September 17, 1961, Cunard Steampship Company occupied Pier 92, North River, under the terms of a lease consummated with the Department of Marine Aviation, City of New York (11a). That a certain farm area was made part of the lease (112a, 113a). That the area just east of the river is a City street known as Twelfth Avenue. That he believed that the area was paved with cobblestones. That Cunard took over the lease for Pier 92 in approximately 1955 (113a, 114a). That the "farm area" is used to store the overflow of cargo that cannot be accommodated on the pier proper. Most of the time the imported cars are stored there. They also have other types of cargo out there at times. The area is used primarily for imported cargo (114a). That this arrangement has existed for years. It is a common practice along the waterfront and the City bills the shipping company on a daily basis for the use of that area (114a, 115a). It is assumed from the bills submitted by the City of New York that its in-

spections are made daily. The charge for the freight is based on tonnage and the charge for the cars is per unit. The following questions were then asked and answers given:

> "Q. Is there any charge made based upon the area involved? A. None.
> "Q. No charge for the use of a certain area. A. It is strictly on the contents of the area that is being used" (115a).

That Cunard Steamship Company has not made any repairs to the roadway adjacent to the bulkhead and the easterly end of Pier 92, North River. To his knowledge Cunard did not request the City to make any repairs to that area but he was not the final word on that question (117a). That none of the ships' equipment can be used to put cargo on the bulkhead (117a). The manner of charging has always been the same (118a).

Matthew Cronin testified that he was employed by Cunard Steamship Company in September 1961 as a security officer to safeguard the cargo and safety of passengers (118a). His office was located on Pier 92, North River. That he never had the occasion to notice whether or not any of the coblestones in the roadway south of the pier, were missing (119a). That roughly they almost always had cars on the street but there was no sort of a demarcation around where the cargo was kept. That to prevent the longshoremen from taking up the space with their cars they extended a rope from pillar to pillar on the Miller Highway to preserve the area for the imported cars (120a). That Cunard occupied this type of cargo to approximately 51st Street. The distance from the pillars to the bulkhead was approximately 25 feet. The ropes are taken down when the transport trucks came for a delivery (121a). The main reason for putting the ropes up is that no private cars come into the empty space which is created by cars leaving. That

heavy cargo is removed from the ship by Merritt Chapman and placed on the bulkhead. This is done by means of a floating crane. Merritt Chapman also picks up freight and loads same on the vessel (122a, 123a).

William Arney testified that he was a longshoreman and was employed by John T. Clark & Son at the time of the accident. On that day he was told to go outside on the bulkhead and watch that the cars were not placed bumper to bumper. He was watching at a particular point somewhere on Twelfth Avenue south of Pier 92 (125a, 126a). He recognized the hole that was pictured in plaintiff's Exhibits 2 and 3. He claimed that the hole existed 4 or 5 years (127a). Before the accident some 4 or 5 cars were parked back to back alongside the bulkhead. He was standing next to a pillar watching plaintiff and Dempsey and the next thing he knew was that the car stopped and fell into the hole. The pusher stopped, stalled for a couple of seconds, started up and plaintiff stepped on the gas to pull it out and the next thing he saw was the seat and Mr. Burns go up in the air (128a).

On cross examination the witness testified he knew that there was a hole there but he was too far away to tell them anything. He was some 25 to 30 feet away (131a).

William J. R. Sexton testified that he is employed by the Department of Marine and Aviation of the City of New York. That the lease Cunard had with the City of New York had expired before September 17, 1961, and all defendant had "was an occupancy permit, revokable permit, issued after the expiration of the lease" (331a). The permit was subject to all the terms and conditions of the recently expired lease (332a). It was agreed that the lease and the extension only embraces Pier 92 and the farm area which was located slightly to the north of the entrance of Pier 92 (333a). This lease or permit did not contain any reference to the marginal

street which was along the pier known as Twelfth Avenue (334a).

The Cunard Steamship Company used the street area, adjacent to the bulkhead running from Pier 91 to Pier 92 under the rules and regulations set by the Commissioner of Marine & Aviation under City Charter, Chapter 29, Paragraph 1712. The Commissioner has the right to assert certain rules and regulations. These regulations were set in 1951. One regulation gives the Commissioner the right to allow cargo to be placed or stored on a marginal street. The department has authorized and permitted Cunard Steamship Company to use that area. The charge was originally set by the Board of Estimate (334a, 335a). Plaintiff's Exhibit 8 shows that 26 cars were stored on the street on September 3, 1961. There were 26 cars on September 4, and 49 on September 5th (335a, 336a). It was noted that the bills also covered Pier 90 which is not involved herein (337a). On September 8, 1961, there was a charge for 5 tons of cargo at Pier 92. Other amounts on different days were read into the record (338a, 339a).

On cross examination the witness testified that the daily charges are made by a dock master. The charge for a car is thirty cents a day (341a). He again stated that under the regulations that since 1955 up to the time of the accident, defendants were charged for whatever they put in the street (343a).

The Defense.

Charles S. Dickson, Jr., testified that in September 1961 he was the head accountant for the Cunard Steamship Company. He was responsible for the financial affairs of the company and also custodian of all leases (344a). That in September, 1961, Cunard's stevedoring

operation was performed by the firm of John T. Clark & Son (344a, 345a). That in September, 1961, John T. Clark took cars off Pier 92 and put them along Twelfth Avenue, along the bulkhead (345a). These longshoremen employed by J. T. Clark brought the cars out from Pier 92, a right turn was then made to go south and the cars were put along the bulkhead in the open area that exists between the bulkhead and the pillars which support Miller Highway. The arrangement with the City was that Cunard would use this area on a per diem basis and pay only when it utilized that area (346a).

That the area in question did not fall within the terms of Cunard's lease for Pier 92. Cunard used this area for overflow of imported cars. The City dock master would make an inspection of that area twice each day and each month they received a bill from the Department of Marine & Aviation, billing Cunard on the actual occupation of the space at thirty cents a car or by cargo at ten cents per ton (346a). Cunard had no lease or written agreement with the Department of Marine & Aviation for that area (347a). That generally when Cunard did not utilize that area the longshoremen would use it as a public parking area. On sailing dates the area would be used as a taxi or a private car feed line or for the convenience of passengers (347a).

On cross examination Mr. Dickson testified that he never observed the condition which is demonstrated in Plaintiff's Exhibit 2 (349a).

On re-direct the witness testified that Cunard made no inspection of the street. That this was a city street (351a). That the person who checks the number of cars on the street would be an employee of John T. Clark (355a).

POINT I.

The law of the New York State is clear that as a matter of law a defendant cannot be held when negligence cannot be anticipated and such anticipation would require "prophetic vision."

The New York Court of Appeals has held that "negligence is gauged by the ability to anticipate * * *" (*McGlone v. Angus, Inc.*, 248 N. Y. 197, 199). The following is what Cunard was required to anticipate:

1. That the employer of plaintiff (John T. Clark) would supply him with a defective pusher in that the ringbolt was missing (52a, 69a).

2. That in the absence of a ringbolt the employer of plaintiff would negligently tie the towing rope around the seat although this seat was only connected to the pusher by two hinges (52a, 57a, 97a).

3. That although the hole was obvious to both Burns and Dempsey Mr. Dempsey would run his car into the hole (62a, 95a-98a), in spite of the fact he had an area of 10 feet to avoid the hole (62a).

4. That although plaintiff knew that the machine had no ringbolt (52a, 53a) and that the rope was tied around his seat which was only connected to the pusher by two hinges, he would not call for a puller or a hi-lo (64a, 90a, 91a), but would deliberately and negligently give his machine more and more power until his seat was pulled off the machine (63a, 64a).

In the famous case of *Palsgraf v. Long Island R. R. Co.*, 248 N. Y. 339, 162 N. E. 99, 59 A.L.R. 1253, the rule was defined by Mr. Justice Cardozo at page 344 when he stated:

> "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."

In the case of *Gralton v. Oliver,* 277 App. Div. 449, 101 N. Y. S. 2d 109, affirmed 302 N. Y. 864, 100 N. E. 2d 49, there was a collision of two automobiles. Plaintiff alighted and helped separate the cars when a third car struck the back of one of the cars and propelled it into the rear of the other car with plaintiff in between. Plaintiff also sued Duval whose car had originally collided with the rear of the other car. The Appellate Division dismissed the complaint against Duval with the following in its opinion:

> "* * * It seems to me that this analysis is sound and depicts a classic example of an instance where a remote cause (Duval's negligence resulting in the first accident), did nothing more than to furnish the condition or give rise to the occasion by which the injury was made possible and which brought about the intervention of a new, independent and efficient cause. Under the undisputed evidence the first was a *causa sine qua non* but not a *causa causans* of plaintiff's injuries. *Trapp v. McClellan,* 68 App. Div. 362, 74 N. Y. S. 130, 133. In such a case it has long and repeatedly been held that the author of the remote cause is not liable for the injury. The rule is thus stated in Corpus Juris, Vol. 45, Negligence, section 491, viz: 'A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury, a distinct, successive, unrelated, and efficient cause of the injury, even though such injury would not have happened but for such condition or occasion.' See also, 65 C. J. S., Negligence, Section 104, p. 653."

> "In *Laidlaw v. Sage,* 158 N. Y. 73, 98-99, 52 N. E. 679, 688, 44 L.R.A. 216, the rule as stated by early text writers is quoted with approval as follows: 'Bishop, in his work on noncontract law (Section 42) in discussing this question after remarking as to the uncertainty with which the term "proximate cause" may have been used and applied, and after defining the terms "proximate" and "remote" cause, says: "If, after the cause in question has been in operation, some independent force comes in, and produces an injury not its natural or probable effect, the author of the cause is not responsible"' * * *"

In the case of *Collins v. Noss,* 258 App. Div. 101, 15 N. Y. S. 2d 475, affirmed 283 N. Y. 595, 28 A. E. 2d 20, the following is found at page 102 of Appellate Division and page 476 of Supplement:

> "Liability for actual negligence must lie within the range of natural and probable consequences. Such risk does not include every possible accident due to unusual and reasonably unforeseeable combination of extraordinary circumstances and to hold the landlord liable for this unique accident would, under the facts disclosed, impose an unreasonable and unjustifiable burden and require of the landlord not reasonable foresight but as was said in another case 'prophetic vision.'" *Polemenakas v. Cohen,* 234 App. Div. 563, 256 N. Y. S. 5, affirmed 260 N. Y. 524, 184 N. E. 77; *Lane v. City of Buffalo,* 232 App. Div. 434, 338, 250 N. Y. S. 579; *McPherson v. City of New York,* 204 N. Y. 430, 433, 97 N. E. 876; *DiBiase v. Ewart & Lake Inc.,* 228 App. Div. 407, 240 N. Y. S. 132, affirmed 255 N. Y. 620, 175 N. E. 339.

This opinion was followed in *Rosen v. The Bronx Hospital,* 284 App. Div. 943, 134 N. Y. S. 2d 765, reversed and complaint dismissed 308 N. Y. 925, 127 N. E. 2d 82.

The latest case in the State of New York on this subject is *Teitsera v. Hudson Transit Corp.* (Erie Rail-

road Company Appellant), 14 N. Y. 2d 855, 251 N. Y. S. 2d 968. In said case the opinion of the New York Court of Appeals contained the following:

> "Order reversed without costs, and the complaints in action nos. 2 and 3 dismissed upon the ground that the trial court erred as matter of law in failing to grant defendants-appellants' motion for a directed verdict. Since the evidence as to the circumstances surrounding the happening of the accident which damaged plaintiffs is undisputed, the question as to whether any act or omission of the defendants-appellants was a proximate cause thereof was one for the court and not for the jury (*Rivera v. City of New York*, 11 N. Y. 2d 856, 227 N. Y. S. 2d 676, 182 N. E. 2d 284)."

POINT II.

Under the law of New York State, Section 200 of the Labor Law, there is no violation of the Labor Law or safe place to work doctrine when the alleged defect is obvious and the workmen are aware of same.

The Trial Court charged New York Law governed this situation (142a) and there can be no question that the Court was right as the accident occurred on a public street owned by the City of New York. The claim was that a hole in the street caused the accident. A public street is not a part of the employer's plant thus Section 200 does not apply (*Hess v. Bernheimer & Schwartz Brewing Co.*, 219 N. Y. 415, 144 N. E. 808). The hole was large in size and plaintiff admitted he knew of the hole (61a, 62a) and he saw it in the pavement while driving his pusher (62a). John Dempsey the driver of the towed car also admitted that he knew of the existence of the hole and that he had tried to avoid it (92a, 93a).

Thus the safe place to work doctrine did not apply herein.

In *Dougherty v. Pratt Institute,* 244 N. Y. 111, 155 N. E. 67, the opinion of Mr. Justice Cardozo contained the following:

> "The absence of hooks was obvious to the worker the moment that he stood upon the ledge. There was no hidden defect accentuating the danger. An owner of a building may owe as great a duty to the invited servant of another as he does to his own servant. He does not owe a greater one (*Hess v. Bernheimer & Schwartz Brewing Co.,* 219 N. Y. 415, 418). The risk was assumed when the cleaner continued at the work (*McLean v. Studebaker Bros. Co.,* 221 N. Y. 475, 478, *Collelli v. Turner,* 215 N. Y. 675). There is no question here of the breach of any statutory duty (*Fitzwater v. Warren,* 206 N. Y. 355). The plaintiff sues at Common Law. The defendant's liability is unaffected by the statute (Labor Law, Section 2d, 202; *Collelli v. Turner, supra*)."

In the case of *McLean v. Studebaker Brothers Co.,* 221 N. Y. 475, 117 N. E. 951, 1 A.L.R. 1551, the opinion of Collin, Jr., contained the following at page 478:

> "* * * The defendant was not bound to accompany him, through the agency of an officer or employee, to the transom and slide the bolt or warn him that the ladder against it might cause it to swing, because no duty rests on a master to secure the safety of his servant against a condition, or even defects, risks or dangers that may be readily observed by the reasonable use of his senses, having in view the age, intelligence and experience of the servant. The plaintiff here was experienced and intelligent. His means of knowing the danger were the same as the defendants. The risks and danger were obvious and comprehensible through ordinary and reasonable care and inspection, and it was not the duty of the defendant to save him

> from them (*McCafferty v. Lewando's F. Dyeing & Cleansing Co.*, 194 Mass. 412; *Flood v. Western Union Tel. Co.*, 131 N. Y. 68; *Stuart v. West End Street Railway Co.*, 163 Mass. 391; *Mississippi River Logging Co. v. Schneider*, 74 Fed. Rep. 195)."

In the case of *Caspersen v. LaSala Brothers Inc.*, 253 N. Y. 491, 171 N. E. 754, the opinion of Cardozo, J., contained the following at the bottom of page 494:

> "* * * The defendant is not chargeable with the negligence of the masons, the servants of the subcontractor. It is chargeable with its own negligence in failing to guard the ways against perils unknown to the worker. The precedents are decisive (citing cases)."

The best resume of the law that we can give to this Court is to quote the case of *Schwartz v. United States*, 229 F. S. 485 (U. S. D. C. N. D. New York) where the opinion of Brennan, D. J., contained the following on page 488:

> "The general principle of law, to the effect that the owner of a structure is under the obligation to provide a safe place to work available to employees of a contractor engaged in the performance of work therein, is not disputed *Casperson v. LaSala Bros.*, 253 N. Y. 491, 171 N. E. 754. This rule has its basis in common law and has been codified by Section 200 of the New York Labor Law, McKinney's Consol. Laws, C31. The duty imposed is not absolute; it does not protect against an obvious danger, neither is it applicable where the work itself creates the hazard. *Mullin v. Genesee County El. L. P. & Gas Co.*, 202 N. Y. 275, 95 N. E. 689. Likewise it affords no basis of liability upon the owner of injuries sustained by reason of the use of defective equipment or appliances furnished by the contractor. *Iacono v. Frank & Frank Contracting Co.*, 259 N. Y. 377, 182 N. E. 23, or by reason of the method used in the performance of the work. *Borshowsky v. B. Altman Co.*, 280 App. Div. 590, 116 N. Y. S.

2d 299, aff'd 306 N. Y. 798, 118 N. E. 2d 818; *Zucchelli v. City Const. Co.*, 4 N. Y. 2d 52, 172 N. Y. S. 2d 139, 149 N. E. 2d 72."

We note that the Trial Court tried to save the plaintiff from the effects of the above case by charging that plaintiff was a business invitee although it did mix this charge with the safe place to work doctrine (412a). Nevertheless, changing the title of plaintiff avails nothing because the duty towards such a visitor is the same.

In the case of *Haefeli v. Woodrich Engineering Co.*, 255 N. Y. 442, the opinion of Pound, J., contained the following on page 451:

> "* * * We think the charge is correct. A business visitor is entitled to expect that the possessor will take reasonable care to discover the actual condition of the property and either make it safe or warn him of its dangerous condition. (Restatement of the Law of Torts, Sec. 213.) * * *"

Here it was admitted that both plaintiff and Dempsey admitted that the hole was open and obvious and they were at all times aware of same (61a, 62a, 92a, 93a).

The Court of Appeals, Second Circuit, in an attempt to overrule the above cases, cited on page three of its *per curiam* a decision of a lower Court (Appellate Division) as overruling the said higher court cases. An examination of the opinion of that case (*Employers Mut. Liab. Ins. Co. v. DiCesare & Monaco Concrete Const. Corp.*, 9 A. D. 2d 379) reveals that it does not clash or overrule the said cases. Instead it follows them and we will quote the last paragraph of said case to illustrate how the Second Circuit failed to consider the vital point involved.

> "Here there was nothing wrong with the ways or approaches to the premises. The injured employee was not the victim of any hidden traps or unguarded openings. He was able to perform everything preliminary to the work itself without let or

hindrance. If, as claimed, the condition of the concrete footing presented dangers in the erection of the steelwork such dangers were perfectly apparent to an experienced steelworker who could readily observe that there were no anchor bolts, that the footings presented an uneven surface, and that no shoring had been provided to keep the columns in place. The concrete footings were not dangerous when the steelworkers came on the premises. They became dangerous only through the manner of their use. The condition of the footing would have presented no danger had the steel subcontractor made appropriate provisions for shoring the vertical columns—a common and acceptable alternative. The method pursued was one over which the general contractor exercised no supervision or control, and under such circumstances it has no liability for defects in the method of operation pursued (*Italiano v. Jefferson Garden Apartments*, 3 A. D. 2d 677, 159 N. Y. S. 2d 338, affirmed 3 N. Y. 2d 977, 169 N. Y. S. 2d 737, *supra*)."

POINT III.

Defendant Cunard was not in control of the city street where the accident occurred, therefore it had no duty to keep same in repair and the Commissioner did not even have the power to surrender its jurisdiction of the street to Cunard.

In the case of *Cullings v. Gaetz*, 256 N. Y. 287, Chief Judge Cardozo stated at page 20: "Liability in tort is an incident to occupation or control." Here plaintiff's own proof was to the effect that the lease held by Cunard from the City of New York made no reference to Twelfth Avenue (344a). All the City did was to give Cunard permission to store the new imported cars on Twelfth Street between the pillars of Miller Highway and the bulkhead, when needed, at a cost of thirty cents per day.

Cunard also had the same privilege for heavy cargo at a cost of ten cents a ton. The dock master employed by the City would daily inspect the street and charge Cunard for what they had put in the street (115a, 334a, 335a, 343a, 346a). When Cunard needed the street it put up a rope along the pillars of Miller Highway to prevent the longshoremen and the public from occupying this area to the exclusion of the cargo (347a). The jury found that Cunard did not create the hole in question (441a, 475a) so there is no liability on that ground. Thus all we have here is a permit to store cars and freight when needed on the street with a daily charge per car and per ton. When no cargo was stored there was no fees paid. Consequently Cunard had no possession or control of Twelfth Avenue and was not required to repair this street or any other public street owned by New York City. The law to this effect is fundamental and clear.

In the case of *Rochester Poster Advertising Co. v. State,* 27 Misc. 2d 99, 213 N. Y. S. 2d 812, affirmed 15 App. Div. 2d 632, 222 N. Y. S. 2d 688, affirmed 11 N. Y. 2d 1036, 230 N. Y. S. 2d 30, the opinion of Alexander Del Giorno, Judge, contained the following:

> "* * * If the contract confers exclusive possession of the premises, or a portion thereof as against the whole world, it is a lease (*Williams v. Hylan,* 223 App. Div. 48, 227 N. Y. S. 392; *Williams v. City of New York,* 214 N. Y. 616, 162 N. E. 547). While if it merely confers a privilege to use or occupy under the owner it is a license. If the contract is for the exclusive possession and profits of the land, it is a lease, not a license (51 C.J.S. Landlord and Tenant, Sec. 202, subd. e [2])."

The Administrative Code of the City of New York contains the following:

> "704 (d) The commissioner shall have exclusive power to regulate the use of marginal streets so that they may be used to the best advantage in

> connection with wharf property and to regulate by license or otherwise the transfer of goods and merchandise upon, over or under all such marginal streets except as may be otherwise provided by law."

There is nothing in this section that gave the commissioner alone power to transfer the street to Cunard and deprive New York City control over same. The fact that Cunard was allowed to park cars for a daily fee (same as in any ordinary parking lot) does not transfer the street to Cunard. Proper objection was taken to the contrary charge (411, 412a, 426a, 427a).

It was held in the case of *Poulos v. Minetti, Commission,* etc., 197 Misc. 611, 92 N. Y. S. 2d 869 (1949), as follows:

> "Section 704 (6)—1.0 of the Administrative Code provides that 'The Commissioner *with the approval of the Board of Estimate* may authorize the lessee of any marginal street to erect and maintain upon the premises so demised sheds, warehouses, coal pockets or other buildings or structures devoted to commercial uses in connection with the adjacent piers and bulkheads.' (Italics supplied.) Passing the question as to whether the lunchstand here involved falls within the type of building enumerated, the petition alleges that the Board of Estimate never approved the agreement herein. Therefore, the Commissioner had no power to make the agreement."

In the case of *Hess v. Bernheimer & Schwartz Brewing Co.*, the opinion of Pound, J., contained the following on page 418:

> "'The duty of the owner to the employee of the contractor is the duty owned by an employer to his own employee in such a case' (*Sullivan v. New Bedford Gas & Edison Light Co.,* 190 Mass. 288; *Crimmins v. Booth,* 219 Mass. 347). The duty at common law *inter alia,* to furnish a safe place to

> work (*Coughty v. Globe Wollen Co.*, 56 N. Y. 124). This duty has been extended by statute (Labor Law, Sec. 200, subd. 1) to include the tools and appliances without which the place to work would be incomplete. 'A plant is defective when any part of it is not in a proper condition for the purpose for which it was intended and it is also defective when it is so incomplete that the use of the plant is dangerous by reason of the failure to furnish reasonably necessary parts for the purpose for which it is used' (*Wiley v. Solvay Process Co.*, 215 N. Y. 591). But the statute refers to the employer's plant and not to the contractor's equipment. * * *"

Under the above circumstances the street certainly did not become part of Cunard's plant and there is no case under New York Law (except for the within action) that supports the decision of the Court of Appeals, Second Circuit.

POINT IV.

Under the settled law of the State of New York Cunard was not responsible for the defective equipment that John T. Clark & Son furnished to its employee or the method used in the performance of the work.

The pushers belonged to John T. Clark & Sons. Some of them had the ring bolts missing and plaintiff would run to the garage to get a pusher with a ring bolt but on the day in question such a pusher was not available and plaintiff had to take one with the ring bolt missing (69a). Plaintiff's superior who works for J. T. Clark then tied the tow rope around the seat (52a, 57a). The seat was only connected to the frame of the pusher by means of two hinges (97a). Thus the pusher was defective and

dangerous to use when the towed car hit a hole or a bump in the road. There is no doubt in the record that the accident occurred because this pusher was defective and defendant Cunard cannot be held liable, because unknown to it the third-party defendant furnished its employee with an unsafe appliance.

However, the questions asked by the jury clearly showed that it was not aware of the above law.

The Court on its own initiative gave the jury six questions to answer along with the general verdict as allowed by Rule 49, subdivision (b). When the jury returned to ask questions it submitted the answers to these special questions (430a). Although these questions were not broad enough to take the place of a general verdict, the Court used them to direct a verdict against defendant (433a, 436a), until it was disclosed that the answers to these questions were not unanimous (436a, 437a). The Court was completely unaware that the first two questions of the jury showed that Cunard was being held liable solely because it thought that Clark was its agent (430a). Counsel for defendant explicitly pointed out to the Trial Court that the first question might necessarily change the whole situation (433a) but nevertheless the Court stated "it may be true that Clark in a legal sense may have acted as agent for Cunard in certain matters but they are irrelevant here," etc. (436a). This remark was included in the exception taken by defendant's counsel (441a). The importance of the juror's question which indicated its findings cannot be overlooked. The accident was caused by the negligence of Clark in supplying a defective pusher and in its agents negligently tying the tow rope around a weakly attached seat and in its servants running the car into the obvious hole and in its servants using the wrong method to get the car out of the hole. For this negligence of Clark the jury has indicated it has held de-

fendant on the ground that Clark was its agent although no evidence of agency appears in the record.

We can best explain by setting forth the first three questions.

> "Question No. 1 reads as follows:
>
> "Can we consider Clark as an agent of Cunard in all matters, and is Cunard responsible for the acts of their agent?"
>
> Question No. 2: If the jury determines that the responsibility of Cunard is minimal, does this influence in any way the possible award for damages?
>
> 3. "We have answered your additional questions according to the attached sheet. Do these answers as given compel us to make a decision for either the plaintiff or the defendant?" (430a).

In view of these questions, it is apparent what the jury had in mind when it answered the six questions submitted to it. It is also apparent that the jury was at a loss to understand what was involved at that time and the Court's answers failed to fully enlighten them.

POINT V.

The Trial Court erred when it ignored New York State law and failed to award a judgment over against the third-party defendant John T. Clark & Son.

It was stipulated that the third-party claim was to be resolved by the Court and not the jury (14a). The Court found against Cunard upon the ground that "a failure to provide a reasonably safe place to work, which amounts to a finding of 'active' as opposed to 'passive' negligence" (472a). For the present we will ignore the other errors set forth in this brief. We refer this Court to the effect

that the employees of Cunard were not aware of this hole in the public street (349a) and that the jury found that Cunard did not cause or create this condition (475a). This is pure passive negligence.

In the case of *Vassiliades v. Joseph P. Blitz, Inc.*, 22 Misc. 2d 51, 193 N. Y. S. 2d 959, affirmed 13 A. D. 2d 539, 214 N. Y. S. 2d 656, it was held that proof of violation of Section 200 of the Labor Law can be passive and the Court allowed a cross-complaint as defendant would then be only secondarily liable for passive negligence. Thus, the Trial Court misconstrued the Law of the New York State and if this Court affirms the judgment for plaintiff, it should award a judgment over against the third-party defendant, John T. Clark & Son.

To the same effect see:

Romanoff v. Benjamin Eisenberg Co., Inc., 35 Misc. 2d 554;
Lilia v. Kiewit Sorr's Co., 35 Misc. 2d 807.

The reason that Cunard never inspected the public street (351a) was because the entire operation on the street was in charge of the third-party defendant, John T. Clark & Son. It was the employees of John T. Clark who checked the number of cars parked on the street (355a). Another employee of John T. Clark & Son was in charge of the operation of towing cars and even watched the accident occur without warning the men to stay away from the hole in the street (125a, 126a, 128a, 131a), nor can it be doubted that plaintiff was guilty of contributory negligence as a matter of law under the rules laid down by the New York State Court of Appeals.

Nucci v. Warshaw Construction Corp., 12 N. Y. 2d 16, 234 N. Y. S. 2d 196.

The cases cited in the opinion of the Court of Appeals, Second Circuit, do not conflict with the above cases; each

of them are limited by their own facts. In *Eisenbach v. Gimbel Bros.* (281 N. Y. 474), the restaurant was not allowed to cross-claim in a trichinosis case because it was guilty of active negligence in not cooking the pork product adequately. In the *Schwartz v. Merola Bros. Const. Corp.* case (290 N. Y. 145), the Court of Appeals stated: "In consequence the Bank cannot recover unless it is guilty of no more than passive negligence," and because the evidence failed to establish "whether intermediate contractor was actively negligent along with subcontractor or was merely passively negligent like owner and general contractor, owner could not recover indemnity for intermediate contractor." In *Bush Terminal Bldgs. Co. v. Luckenback S. S. Co.* (9 N. Y. 2d 426), the case came to the Court of Appeals from an order granting motions by a cargo storer and equipment repaver to dismiss cross-claims of operator. The Court found that the complaint had changed active negligence and "since actual fault is the predicate for liability against Luckenback, it cannot claim over against Muehlstein" (p. 430). Here, as explained above, there was no proof or evidence of actual notice to Cunard. Let us look at the opinions of the Court of New York State on this point.

In the case of *Tipaldi v. Riverside Memorial Chapel Inc.*, 273 App. Div. 414, 78 N. Y. S. 2d 12, affirmed 298 N. Y. 686, 82 N. E. 2d 585, the opinion of Callahan, J., in the Appellate Division contained the following:

> "* * * The owner was liable only by reason of ownership of the property and for omission of a duty imposed by law, not because of its active interposition or personal participation in an affirmative act of negligence. The general contractor should not be permitted to avoid its obligation to indemnify the owner on the plea that it was guilty of passive negligence in the same degree as the owner. To accept this plea would be to allow the avoidance of responsibility for the nonperformance

or breach of a contractual duty independently owing to the owner.

"We hold that the owner and general contractor are not *in pari delicto* and that the evidence sufficiently establishes the liability of the general contractor to indemnify the owner for the damages imposed upon the latter by operation of law. * * *"

In the case of *Wischnic v. Dorsch,* 296 N. Y. 257, 72 N. E. 2d 700, the opinion of the New York State Court of appeals passed upon Section 241 of the Labor Law (since repealed), and stated that the wording placed a positive duty on the owner and contractor. The Court then stated:

"* * * We also concluded, and it seems to have been overlooked, that we should not extend such rule to other fields not included in its scope (*Labor Law*, Section 241), but leave those situations to be controlled by the rules and standards antedating the statute.

"* * *; that the tenant had an active, primary duty; and that the plaintiff's alleged injuries, if any resulted from its active wrongdoing. The owner, although under a statutory duty (*Labor Law,* Section 255, 316), was a passive wrongdoer at best.

"* * * However, it is something else to hold that the Legislature, in adopting a statute to benefit a person in fields of activity other than construction and demolition work, also intended to deprive the owner, guilty of only passive negligence at most, of his common-law right against the party in possession and control, whose negligence was the active and primary cause of plaintiff's injury. * * *"

Reasons for Granting the Writ.

The opinions of the Courts below are proof that *Erie v. Tompkins* (*supra*) had atrophied to the extent that is now dead wood. If that is the wishes of this Court, we most respectfully urge that this Court grant the Writ

of Certiorari so it can once and for all either restate the case or overrule it so that attorneys in all our 50 states can know which way to turn. The opinions herein have certainly thrown the New York State Law into a degree of extreme confusion. All the decisions, including those by the foremost jurist, Mr. Justice Cardozo, have been overruled and the famous Labor Law cases of New York Court of Appeals are now no longer the guide for lawyers. Even the settled rule, 'prophetic vision,' has been ignored by the Federal Courts and the Public Street of New York City contrary to the New York City Charter and the Administrative Code of that City have been transferred to private ownership by the mere payment of parking fees per day. With this transfer, the Federal Courts have given Cunard the right to build structures or otherwise misuse the public street. In addition, the law, as expounded by the Federal Court, now allows a third party to cause injury to its own men with immunity and the burden of compensation is cast on the hirer of the third party who has nothing to do with the equipment or the methods of work employed by the third party.

Certainly the overturning of so many settled rules of New York State demands that the Writ be granted and the validity of *Erie v. Tompkins* be settled for all times.

Wherefore, petitioner respectfully prays that a Writ of Certiorari should be granted and this Court reverse the Courts below and dismiss the complaint or grant judgment over against third party and reinstate the opinions of the New York State Court of Appeals.

Respectfully submitted,

THE CUNARD STEAMSHIP COMPANY, Ltd.,
Petitioner,
by Thomas V. Kingham,
Attorney.

BERNARD MEYERSON,
On Petition.

New York State Labor Law in Effect 1961.

§200. General duty to protect the health and safety of employees;

1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein. The board shall make rules to carry into effect the provisions of this section.

Memorandum Opinion by Tyler, J., Denying Defendant Cunard's Motion and Dismissing the Third-Party Complaint as Against the Third-Party Defendant, John T. Clark and Son.

TYLER, D. J.:

This personal injury action, based on diversity of citizenship, was tried before the court and a jury on January 18, 19, 22, 23 and 24, 1968. On the early evening of January 24th, the jury returned a verdict in favor of plaintiff in the sum of $105,000.00.

Defendant ("Cunard") has now moved for judgment n.o.v. pursuant to Rule 50(b), F. R. Civ. P., or in the alternative, for an order granting defendant a new trial. Rule 59, F. R. Civ. P.

This memorandum will deal with the post-trial motions of Cunard and, as well, the issue of liability under the third-party complaint which, according to stipulation of counsel, was reserved for resolution by the court without the jury.

Defendant's Post-Verdict Motions

In the main, counsel for Cunard in his papers in support of the post-verdict motions has rehashed the legal arguments and issues which were resolved by rulings of the court during trial. In addition, counsel attempts to sift the evidence with understandable focus on such strands thereof as favor Cunard, both on the issue of liability and damages. Obviously, however, the fact issues were resolved by the jury. Specifically, by its general verdict and by its answers to special interrogatories submitted by the court pursuant to Rule 49(b), F. R. Civ. P., the jury found that:

1. On September 17, 1961 the place where the accident occurred was in an unreasonably defective condition.

2. This defective or unsafe condition played a significant part in bringing about the injury or injuries complained of by plaintiff.

3. The place of the accident was under the dominion and control of Cunard on the day of the accident.

4. The plaintiff was not negligent on the day in question.

In his papers, counsel for Cunard attempts to show that findings 1, 3 and 4 are incorrect as a matter of law under the relevant New York cases. The attack on finding number 3 is based on the fact that the situs of the accident was Twelfth Avenue in Manhattan, a public thoroughfare. In some cases the theory of a failure to provide a safe place to work can be met by a showing that the defendant exercised no dominion or control over the area where the injury was alleged to have occurred. In this case, however, it is conceded that Cunard used a portion of Twelfth Avenue as a storage area under an oral license with the City, paying 30¢ per car, per day and roping off that area when in use. Under such circumstances, and in consideration of pertinent New York case law, I cannot find that Cunard exercised no dominion or control over the area where plaintiff was injured. See *Eisenberg v. Irving Kemp, Inc.*, 256 App. Div. 698, 11 N. Y. S. 2d 449 (1939).

Cunard further contends that either finding number 1 or number 4 is erroneous because the hole into which the auto fell while being towed by plaintiff just prior to the accident was in plain view and its existence was known to him for a significant period of time prior to the accident.

Burns, however, had the task of steering his vehicle and towing the attached automobile through the relatively narrow space between the edge of the hole and the publicly traveled portion of Twelfth Avenue. Reason-

able men could differ on the duty owed by Cunard to him and his freedom from contributory negligence. Thus, I cannot say that the jury's answers to interrogatories 3 and 4 were erroneous as a matter of law.

It seems beyond cavil that the jury fully understood the issues presented and resolved them against Cunard. As counsel for plaintiff has pointed out in his brief, it matters not that the jury in some of its questions to the court prior to verdict indicated a possible viewpoint that there was negligence on the part of the third-party defendant John T. Clark and Sons ("Clark") which played a part in bringing about plaintiff's accident.

Finally, it should be noted that counsel for Cunard also seems to be urging upon this court that there be a remittitur of damages. Although I confess that had I been the trier of the facts in this case, I never would have awarded damages in an amount as large as $105,000.00, I cannot say upon review of my trial notes that the verdict shocks my conscience. Put differently, there is a medical and other evidence relating to damages which would support the verdict in question in the eyes and minds of twelve representative citizens selected for jury service in this case. Consequently, I have no warrant to disturb the jury's findings and award even if my views do not strictly accord with those of the jury. See *Dellaripa v. New York, N. H. & H. R. R.*, 257 F. 2d 733 (2d Cir. 1958).

The post-verdict motions of Cunard are denied in all respects.

The Third-Party Claim

From the evidence adduced during the trial, there was ample latitude for the finder of facts concerning the third-party complaint to determine that a competent producing cause of the injuries of Lawrence Burns was certain

negligent acts and omissions on the part of his employer, Clark. To illustrate, there was evidence from which it can be inferred that the towmotor being driven by Burns was inadequately maintained and repaired. In particular, it would appear from the evidence that there was no ring or eye on the back of the towmotor for the purpose of fastening a cable or rope for towing purposes. In view of the absence of this ring, the rope towing the automobile which participated in the incident on the day in question was tied around the seat on which Burns sat. In addition, it might also be inferred that the work procedures of Clark were slipshod in that no one acting on Clark's behalf took steps to seal off the hole area or to erect warning signs. Specific findings in this and any other area are, however, unnecessary. Since the underlying tort is governed by New York rather than maritime law, see *LiMandri v. Brasileiro,* 316 F. 2d 3 (2d Cir. 1963); *Fredericks v. American Export Lines, Inc.,* 227 F. 2d 450 (2d Cir. 1955), *cert. denied,* 350 U. S. 989 (1956), New York law is also dispositive of the controversy between Cunard and Clark. Thus, maritime cases such as *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.,* 350 U. S. 124 (1956) are inapposite on the issue of indemnification.

Under New York law, a finding that Clark was a tort-feasor in this case would not aid Cunard. The basis of liability found by the jury was a failure to provide a reasonably safe place to work, which amounts to a finding of "active" as opposed to "passive" negligence. As discussed in *Ingham v. Eastern Airlines, Inc.,* 373 F. 2d 227, 240 (2d Cir. 1967), that dichotomy is not based on the distinction between torts of omission and those of commission, upon which Cunard seems to rely. With exceptions not pertinent here, an active tort-feasor can-

not recover indemnification from a fellow joint tort-feasor. See *Bush Terminal Bldg. Co. v. Luckenbach S. S. Co.*, 9 N. Y. 2d 426, 214 N. Y. S. 2d 428 (1961). Thus, Cunard's third-party claim against Clark cannot succeed.

The ultimate liability for plaintiff's injuries, therefore, falls on Cunard, which, for aught that appears, is somewhat less culpable than Clark. Nevertheless, there are strong policy considerations that underlie this branch of the law, see Contribution Among Tort-Feasors, 54 Harv. L. Rev. 1156 (1941), excerpted in Gregory & Kalven on Torts 678-80 (1959), and various alternatives which Cunard could have availed itself to preclude some or all of the liability incurred in this case.

Accordingly, the third-party claim against Clark is dismissed on the facts and the law.

It is so ordered.

March 27, 1968.

s/ H. R. TYLER, JR.
U. S. D. J.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 150—September Term, 1968.

(Argued October 30, 1968 Decided December 4, 1968.)

Docket No. 32454

LAWRENCE BURNS,

Plaintiff-Appellee,

v.

THE CUNARD STEAMSHIP COMPANY, LTD.,

Defendant-Appellant and Third-Party Plaintiff-Appellant,

v.

JOHN T. CLARK & SON,

Third-Party Defendant-Appellee.

Before:

Lumbard, Chief Judge,

Kaufman and Hays, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., Judge, (1) in favor of plaintiff after a jury trial in an action for damages for personal injuries and (2) in favor of the third-party defendant in defendant's action for indemnity after trial without a jury.

Affirmed.

Bernard Meyerson, New York, New York (Thomas V. Kingham, on the brief), for Appellant.

Chester A. Hahn, New York, New York (Sylvia Miller, on the brief), for Appellee Burns.

Sidney A. Schwartz, New York, New York (Alexander, Ash & Schwartz, New York, New York, of counsel to Hampton & Dietel, New York, New York, on the brief), for Appellee John T. Clark & Son.

Per Curiam:

Defendant-appellant and third-party plaintiff-appellant The Cunard Steamship Company, Ltd. appeals from a judgment of the United States District Court for the Southern District of New York, Harold H. Tyler, Jr., Judge, (1) in favor of appellee Lawrence Burns after a trial before a jury in his action for personal injuries and (2) in favor of third-party defendant-appellee John T. Clark & Son after a trial without a jury in Cunard's action for indemnity.

Burns, an employee of Clark, was injured while towing an automobile with a "pusher" owned by Clark. Clark had a contract with Cunard providing for the removal of cargo. Burns' injury occurred on a portion of a New York City street used by Cunard for storage purposes. A wheel of the car that was being towed went into a hole in the pavement. In trying to get it out of the hole Burns was thrown from the "pusher," sustaining the injuries that are the basis for this suit.

Cunard raises several issues on this appeal. Principally it argues that it was not in control of the storage area where the accident occurred and that therefore the district court erred in applying to this area the same place of work provision of N. Y. Labor Law § 200 (McKinney 1965). The area was used primarily for storage of imported cars and in the course of storing the cars employees were often working in the area. When it was in use the area was roped off to keep out the public, and it was almost always in use.

Although there was no lease for the area, Cunard exercised exclusive control over it at its pleasure and had done so for years. The fact that storage charges were levied by the city on a per item or per ton basis does not detract from the effect of Cunard's control. What is involved is not a mere public street where Cunard could park cars if space was available; rather the area was a regular place of work under Cunard's direction and control so that Cunard had a duty to make it a safe place of work. See *Employers Mut. Liab. Inc. Co. v. DiCesare & Monaco Concrete Constr. Corp.*, 9 A. D. 2d 379 (1959).

The jury specifically found that the area was unsafe. It is no defense that the dangerous condition is obvious where the exercise of ordinary care will not protect the employees. In the present case the inadequacy of knowledge as a defense is established by the evidence that Dempsey, the driver of the car being towed by Burns, knew of the hole, tried to avoid it and failed.

Cunard's argument that it was not responsible for the defective pusher supplied by Clark is irrelevant to the issue of Cunard's liability as the jury reasonably found that the hole was the proximate cause of Burns' injury.

The verdict of $105,000 is not excessive. See *Grumenthal v. Long Island R. R.*, 37 U. S. L. W. 4029 (U. S. Nov. 18, 1968). Burns has already lost about $80,000 in wages and stands to lose much more.

Judge Tyler properly dismissed Cunard's third-party complaint against Clark. Under N. Y. Labor Law § 200, Cunard had a duty to inspect the area and to repair the hole, since a reasonable inspection would have disclosed its existence. Cunard's failure to do so was active negligence and thus it cannot obtain indemnity from Clark. See *Bush Terminal Bldgs. Co. v. Luckenbach S. S. Co.*, 9 N. Y. 2d 426 (1961); *Schwartz v. Merola Bros. Constr. Corp.*, 290 N. Y. 145 (1943); *Eisenbach v. Gimbel Bros.*, 281 N. Y. 474 (1939).

Affirmed.

Decision on Petition for Rehearing.

32454

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

LAWRENCE BURNS,

Plaintiff-Appellee,

v.

THE CUNARD STEAMSHIP COMPANY, LTD.,

Defendant and Third-Party Plaintiff-Appellant,

JOHN T. CLARK and SON,

Third-Party Defendant-Appellee.

A petition for rehearing praying in the alternative to stay the issuance of the mandate having been filed herein by the appellant,

Upon consideration thereof, it is

Ordered that the petition for rehearing be and it hereby is denied.

Stay of mandate is granted subject to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

J. EDWARD LUMBARD
IRVING R. KAUFMAN
PAUL R. HAYS

Circuit Judges

Ent M/B
M/s 12/23/68